

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AVOCENT REDMOND CORP., a
Washington corporation,

Plaintiff,

v.

ROSE ELECTRONICS, a Texas general
partnership; PETER MACOUREK, an
individual; DARIOUSH "DAVID" RAHVAR,
an individual; ATEN TECHNOLOGY INC., a
California corporation; ATEN
INTERNATIONAL CO., LTD., a Taiwanese
Company; TRIPPE MANUFACTURING
COMPANY, an Illinois corporation; BELKIN
INTERNATIONAL, INC., a Delaware
corporation and BELKIN INC., a Delaware
corporation,

Defendants.

Case No. 2:06-CV-01711-RSL

**DEFENDANTS' MOTION FOR
LEAVE TO FILE DEFENDANTS'
FIRST AMENDED ANSWERS AND
COUNTERCLAIMS**

Noted on Motion Calendar:
January 6, 2012

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. GOVERNING LAW—FEDERAL COURTS FREELY GRANT LEAVE TO AMEND PLEADINGS	2
III. ARGUMENT.....	2
A. Defendants’ Amended Answers Are Timely.....	2
B. Defendants’ Inequitable Conduct Defense is Not “Futile”	4
C. Defendants Have Amended in Good Faith, Without Dilatory Motive	5
D. Avocent Will Not Be Prejudiced	6
IV. CONCLUSION.....	6

TABLE OF AUTHORITIES

<i>Adams v. Gould Inc.</i> , 739 F.2d 858 (3rd Cir. 1984)	5
<i>Ashcroft v. Iqbal</i> , 129 S.Ct. 1937 (2009)	4
<i>Central Admixture Pharm. Servs., Inc., v. Advanced Cardiac Solutions, P.C.</i> , 482 F.3d 1347 (Fed. Cir. 2007)	3
<i>Connectics Corp. v. Pentech Pharm., Inc.</i> , No. 08 C2230, 2009 WL 1309102 (N.D. Ill. May 8, 2009)	5
<i>DCD Programs, Ltd. v. Leighton</i> , 833 F.2d 183 (9th Cir. 1987).....	2, 4
<i>Enzo Life Sciences, Inc. v. Digene Corp.</i> , 270 F.Supp.2d 484 (D. Del. 2003)	3
<i>Exergen Corp. v. Wal-Mart Stores, Inc.</i> , 575 F.3d 1312 (Fed. Cir. 2009)	3
<i>Foman v. Davis</i> , 371 U.S. 178 (1962)	2, 4, 5
<i>Kontrick v. Ryan</i> , 540 U.S. 443 (2004).....	2
<i>LifeScan, Inc. v. Polymer Tech. Int’l Corp.</i> , No. C94-672R, 1995 WL 271599 (W.D. Wash. Jan. 3, 1995).....	2
<i>Senza-Gel Corp. v. Seiffhart</i> , 803 F.2d 661 (Fed. Cir. 1986)	2
<i>Therasense Inc. v. Becton Dickinson & Co.</i> , 2011 WL 2028255 (Fed. Cir., May 25, 2011).....	4

RULES

Fed. R. Civ. P. 15(a)(2).....	1, 2
-------------------------------	------

OTHER AUTHORITIES

35 U.S.C. § 103	4
-----------------------	---

1 **I. INTRODUCTION**

2 Pursuant to Fed. R. Civ. P. 15(a)(2), Defendants ATEN International Co., Ltd. and ATEN
3 Technology, Inc. ("ATEN") and Belkin International, Inc. and Belkin, Inc. ("Belkin") (collectively,
4 "Defendants") respectfully request leave of court to amend their Answers and Counterclaims to
5 assert inequitable conduct defenses and counterclaims.¹ At the time of filing this motion, Plaintiff
6 Avocent Redmond Corp. ("Avocent") has not indicated whether it will oppose Defendants' request
7 for leave to amend, but has previously indicated its disfavor of amendments based on inequitable
8 conduct.

9 Defendants' request is timely as it is before the Court's deadline for amending pleadings.
10 (Dkt. 280) (Stipulation and Order Setting Deadline of December 20, 2011 to Amend Pleadings)
11 ("Court's Scheduling Order") Further, although claim construction briefs have been filed, discovery
12 in this case is still at an early stage and not set to close until June 13, 2012. Granting Defendants
13 leave to amend will not affect any deadline on the case schedule.

14 Defendants have also been diligent because Defendants' inequitable conduct defense turns in
15 part on deposition testimony that became available after the case was stayed and was developed in
16 connection with intervening litigations and reexaminations proceedings involving these same
17 patents-in-suit. Avocent, however, did not provide this evidence to Defendants until two weeks ago,
18 despite repeated requests.

19 Granting Defendants leave to amend will not prejudice Avocent. None of the allegations or
20 facts forming the basis of Defendants' inequitable conduct defense is new to Avocent. The
21 defendants in the two patent cases Avocent filed after the 2007 stay, both involving these same
22 patents, asserted inequitable conduct defenses that are similar to the theories set forth in defendants'
23 proposed pleadings. Avocent, therefore, has already been litigating this defense for quite some time.

24
25
26 ¹ Defendants' [proposed] amended Answers are attached to the supporting Declaration of Gregory K. Storey ("Storey
27 Decl."), filed herewith, as Exhibit A (of ATEN International Co., Ltd.), Exhibit B (of ATEN Technology, Inc.), and
Exhibit C (of Belkin International, Inc. and Belkin, Inc.). The inequitable conduct defenses and counterclaims in these
[proposed] amended Answers are substantially the same.

1 Federal courts freely grant leave to amend pleadings. The proposed amendment will cause
 2 no delay and will align the defendants defenses with those developed from a parallel litigation
 3 proceeding.

4 **II. GOVERNING LAW—FEDERAL COURTS FREELY GRANT LEAVE TO AMEND** 5 **PLEADINGS**

6 Under Fed. R. Civ. P. 15(a)(2), “leave [to amend] shall be freely given when justice so
 7 requires.” *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004); *Foman v. Davis*, 371 U.S. 178, 182 (1962).
 8 The rule strongly favors amendments and courts must grant motions to amend with “extreme
 9 liberality.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). “[T]he nonmovant
 10 bears the burden of showing why amendment should not be granted.” *Senza-Gel Corp. v. Seiffhart*,
 11 803 F.2d 661, 666 (Fed. Cir. 1986).

12 When considering a leave to amend, this District and the Ninth Circuit consider four factors:
 13 (1) undue delay, (2) futility of amendment, (3) bad faith, and (4) prejudice to the opposing party.
 14 *LifeScan, Inc. v. Polymer Tech. Int’l Corp.*, No. C94-672R, 1995 WL 271599, at *17 (W.D. Wash.
 15 Jan. 3, 1995) (citing *Foman*, 371 U.S. at 182); *DCD Programs*, 833 F.2d at 186. All four factors
 16 favor granting Defendants leave to amend.

17 **III. ARGUMENT**

18 **A. DEFENDANTS’ AMENDED ANSWERS ARE TIMELY**

19 Defendants have acted diligently in gathering and assessing the evidence supporting the
 20 affirmative defense of inequitable conduct. Because Defendants are seeking leave to amend within
 21 the Court’s deadline (Dkt. No. 280), the amendment is presumptively timely. Indeed, Avocent
 22 agreed to the December 20, 2011, deadline just one month ago. *Id.*; *see also* Dkt. No. 262 (Amended
 23 Order Setting Trial Date and Related Dates).

24 Discovery in this case is still in its early stages. Fact discovery does not close for six months,
 25 on June 13, 2012. *Id.* Moreover, discovery only resumed in August 2011 after the Court lifted its
 26 four-year stay, and the parties have not even started to take depositions. *See* Storey Decl., ¶ 4.

27 Defendants are timely requesting leave to amend, especially in light of Avocent’s refusal to

1 produce documents over the past several months directly relevant to this defense. Not long after the
 2 Court lifted the stay, both ATEN and Belkin requested that Avocent produce deposition transcripts
 3 and other confidential documents from its case against Raritan Americas, Inc., in part for the purpose
 4 of reviewing and assessing evidence of inequitable conduct. For three months, Defendants sent
 5 letters requesting these documents. Storey Decl., Ex. E (letters to Avocent dated 9/19/2011,
 6 10/04/2011, 10/13/2011, and 11/03/2011, 11/10/2011, and 11/15/2011). Avocent finally produced
 7 the requested documents on 12/02/2011, and they contained additional evidence supporting
 8 Defendants' inequitable conduct defense. Storey Decl., ¶ 9.

9 Examples of those recently produced documents include the Expert Report of Mr. Nicholas
 10 Godici (former Commissioner of Patents for the United States Patent Office), which was prepared in
 11 the pending *Avocent Redmond Corp. v. Raritan Americas, Inc.*, case No 10-CV-6100 (SDNY 2010)
 12 ("the Raritan II Litigation"). Mr. Godici's report presents detailed review and analysis of record
 13 evidence including confidential deposition testimony, intervening reexamination conduct, and
 14 documents produced and uncovered after this Court stayed this case. Mr. Godici's report concludes
 15 that the patents-in-suit should be rendered unenforceable due to inequitable conduct. Because
 16 allegations of inequitable conduct must be plead with particularity, Defendants needed the time to
 17 seek and obtain relevant documents, review records from the intervening proceedings, and conduct
 18 the requisite detailed analysis to support such a pleading. *Enzo Life Sciences, Inc. v. Digene Corp.*,
 19 270 F.Supp.2d 484, 489 (D. Del. 2003) (to plead inequitable conduct sufficiently in patent cases,
 20 parties must be "prudent and possibly required to confirm the factual allegations through
 21 discovery"); *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1328-29 (Fed. Cir. 2009) ("[A]
 22 pleading of inequitable conduct under Rule 9(b) must include sufficient allegations of underlying
 23 facts from which a court may reasonably infer that a specific individual (1) knew of the withheld
 24 material information or of the falsity of the material misrepresentation, and (2) withheld or
 25 misrepresented this information with a specific intent to deceive the PTO.")); *Central Admixture*
 26 *Pharm. Servs., Inc., v. Advanced Cardiac Solutions, P.C.*, 482 F.3d 1347, 1356-57 (Fed. Cir. 2007)
 27 (requiring that inequitable conduct be plead with particularity).

Defendants have acted expeditiously and properly in conducting the necessary investigation to insure sufficient evidentiary support for pleading this defense, and are timely seeking leave to amend, consistent with the Court's Scheduling Order.

B. DEFENDANTS' INEQUITABLE CONDUCT DEFENSE IS NOT "FUTILE"

Motions for leave to amend should be granted unless the proposed amendment would be futile. *Foman*, 371 U.S. at 182. If an amendment states a claim upon which relief could be granted, it is not futile. *DCD Programs, Ltd.*, 833 F.2d at 188 ("Where the underlying facts or circumstances of a case 'may be a proper subject of relief, [the asserting party] ought to be afforded an opportunity to test his claim on the merits.'") (citation omitted). Federal courts allow parties to amend pleadings so long as the claim or defense has "facial plausibility." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

Defendants have plead their inequitable-conduct defense with great particularity in their proposed amended Answers and Counterclaims (Storey Decl., Ex. A-C). For example, during the prosecution of the three patents-in-suit (both in the original prosecution and in later re-examination proceedings involving all three patents-in-suit), Avocent failed to disclose several key prior-art references and related information to the United States Patent and Trademark Office ("USPTO") with the requisite intent to mislead or deceive the Examiner that supports a pattern of avoiding its duty of disclosure. The allegations set forth track in many respects those set forth by the former Commissioner of Patents for the United States Patent Office, who opines that the evidence of inequitable conduct in this case satisfies even the tightened standards set forth in the Federal Circuit's recently issued en banc opinion in *Therasense Inc. v. Becton Dickinson & Co.*, 2011 WL 2028255 (Fed. Cir., May 25, 2011).

Further, when the USPTO finally had the opportunity to consider during recent reexamination certain prior art that was cited in the prosecution of a Japanese counterpart of one of Avocent's related patents, it used the prior art to find several of Avocent's asserted claims unpatentable. *See* Storey Decl., Ex. F (2011 PTO Office Action from the '978 reexamination proceeding issuing a final rejection of nine of the '978 claims asserted in this case under 35 U.S.C. §

103 (obviousness)).² Thus, the withheld prior art is unquestionably material.

Perhaps the strongest argument against futility is the fact that Avocent twice unsuccessfully argued to federal courts that defendants in other cases lacked sufficient factual or evidentiary basis to pursue an inequitable conduct defense. After this case was stayed in 2007, Avocent filed two additional suits. The first was against the United States and Rose Electronics in 2008 in the U.S. Court of Federal Claims (*Avocent Redmond Corp. v. United States and Rose Electronics* [Defendant-Intervenor], Case No. 08-69C. The second was the *Raritan II* litigation (still pending). In both cases, Avocent unsuccessfully opposed assertions of inequitable conduct. The Court of Federal Claims also denied Avocent's motion for summary judgment on this defense. Storey Decl., Ex. G (finding that Rose Electronics' inequitable conduct defense identified facts and circumstances from which a reasonable fact finder could infer that Avocent withheld material information from the PTO with the intent to deceive). Avocent settled with Rose Electronics before that Court could decide the inequitable-conduct issue.

Defendants' proposed amendments, adding the affirmative defense of inequitable conduct, is far from futile. The applicable federal standard only requires that Defendants plead a plausible defense. As other courts have already concluded, the evidence here easily meets that standard.

C. DEFENDANTS HAVE AMENDED IN GOOD FAITH, WITHOUT DILATORY MOTIVE

Whether a proposed amendment is made in good faith is assessed in light of the amending party's motives. *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3rd Cir. 1984). Any suggestion of bad faith is, again, not supported by facts. Defendants' sole motivation is to seek the adjudication of their inequitable conduct defense on its merits, not to delay or extend any deadlines.

After analyzing the domestic prosecution histories for the three patents-in-suit, including the recent (post 2007) files of the reexamination proceedings, the foreign counterpart patent applications, foreign prior art, expert opinions and analyses rendered in other cases, and the recent (2011) deposition transcripts, Defendants have a good-faith belief that each of the patents-in-suit will be

² Avocent has appealed this Final Rejection, and thus has not dismissed these claims from this case.

1 held unenforceable due to Avocent's intentional withholding of material prior art and other
2 information from the USPTO. The U.S. Supreme Court in *Foman* stated that where a party's
3 amendment is "a proper subject of relief, he ought to be afforded an opportunity to test his claim on
4 the merits." 371 U.S. at 182. "The purpose of Rule 15(a) is to provide the maximum opportunity for
5 each claim to be heard on the merits." *Connectics Corp. v. Pentech Pharm., Inc.*, No. 08 C2230,
6 2009 WL 1309102, at *3 (N.D. Ill. May 8, 2009). There is no support here for any suggestion of bad
7 faith.

8 **D. AVOCENT WILL NOT BE PREJUDICED**

9 Defendants' proposed amended Answers, including the inequitable conduct defense, cannot
10 possibly prejudice Avocent. Avocent and its counsel have been actively litigating this defense for
11 years in other cases. In fact, the Court of Federal Claims, in ruling on the motion from Rose
12 Electronics for leave, found that Rose's amendment was not futile, not untimely, not unduly
13 prejudicial and granted the motion given the court's policy favoring amendments. Storey Decl., Ex.
14 H.

15 Further, Defendants' proposed amendments will require no change in the case schedule or
16 affect any deadlines. Indeed, it is Defendants, not Avocent, who will need to take discovery on this
17 defense.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Defendants respectfully request that the Court grant the requested
20 leave to amend.

1 DATED this 20th day of December, 2011

2 /s/ Michael A. Moore

3 Michael A. Moore, WSAB #27047
4 CORR CRONIN MICHELSON
5 BAUMGARDNER
6 & PREECE LLP
7 1001 4th Ave Ste 3900
8 Seattle, WA 98154-1051

9 Robert W. Dickerson (*pro hac vice*)
10 Yasser M. El-Gamal (*pro hac vice*)
11 DICKSTEIN SHAPIRO LLP
12 2049 Century Park East, Suite 700
13 Los Angeles, CA 90067

14 Jeffrey A. Miller (*pro hac vice*)
15 DICKSTEIN SHAPIRO LLP
16 700 Hansen Way
17 Palo Alto, CA 94304

18 Attorneys for Defendants BELKIN
19 INTERNATIONAL, INC. and BELKIN
20 INC.

21 DATED this 20th day of December, 2011

22 /s/ Gregory K. Storey

23 Ming-Tao Yang (*pro hac vice*)
24 Gregory K. Storey (*pro hac vice*)
25 FINNEGAN, HENDERSON, FARABOW,
26 GARRETT & DUNNER LLP
27 3300 Hillview Avenue
Palo Alto, CA 94304-1203

Thomas F. Ahearne, WSBA #4844
FOSTER PEPPER
1111 Third Avenue
Suite 3400
Seattle, WA 98101-3299

Attorneys for Defendants ATEN
TECHNOLOGY INC. and ATEN
INTERNATIONAL CO., LTD.

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the parties who have appeared in this action as of today's date. There are no other parties who have appeared in this action as of the time this is being prepared for filing that need to be served manually.

DATED this 20th day of December, 2011

By: s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA #4844